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Supreme Court U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

BILLY D. HARMAN, JR.,
Petitioner,

VERSUS

STATE OF LOUISIANA,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court
Of The State Of Louisiana

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether counsel provided ineffective assistance to Billy Harman, which resulted in a guilty plea that would not have been made but for the inadequacy of representation afforded Mr. Harman in a criminal trial.

II. Whether the ineffective assistance of counsel provided to Mr. Harman effectively rendered his guilty plea involuntary, therefore denying him the Due Process of Law provided for in the Fourteenth Amendment.

II. Whether the action by the trial court violates the 6th Amendment in that such action deny's Mr. Harman of a constitutionally protected right to be represented by competent counsel.

PARTIES TO THE PROCEEDING

Petitioner

Billy D. Harman

Respondent

State of Louisiana

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Petitioner respectfully requests this Court to issue a Writ of Certiorari to review the judgment of the Supreme Court for the State of Louisiana, denying Supervisory and/or Remedial Writs from a judgment of the 17th Judicial District Court for the State of Louisiana denying petitioner Post-Conviction Relief.

OPINIONS BELOW

This matter comes to the Court from the State of Louisiana, where Billy Harman was sentenced to 30 years at hard labor, such sentence handed down on October 25, 1995, in the 17th Judicial District Court. On July 17th, 2000, a Post-Conviction Relief hearing was held in the 17th Judicial District Court. A transcript of the Post-Conviction Relief Proceeding is reproduced in Appendix F at App. 26a-185a. A judgment denying said relief was handed down on October 23, 2000. The Minute Entry of the Post-Conviction Relief Judgment is reproduced in Appendix D at App. 4a, and the transcript of the Post-Conviction Relief Judgment is reproduced in Appendix E at App. 5a-25a. On August 9, 2001, the Louisiana First Circuit Court of Appeal denied defendant's application for writ of certiorari. The First Circuit decision is unreported and reproduced in Appendix B at App. 2a. Finally, on September 20, 2001, the Louisiana State Supreme Court denied defendant's writ. The Supreme Court decision is reported at 825 So.2d 468 and reproduced in Appendix A at App. 1a.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257 in that the denial of petitioner's writ by the Supreme Court of Louisiana amounts to a final judgment

by the highest court of the state, and the question upon appeal is whether an action taken by a state court is repugnant to the Constitution of the United States in that such action violates petitioner's 6th Amendment right to assistance of counsel, and his 14th amendment right to due process.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense."

The Fourteenth Amendment provides:

> "[N]or shall any State deprive any person of life, liberty, or property, without the due process of law."

STATEMENT OF THE CASE

A. Course of Proceedings

Billy D. Harman, Jr. was arrested on June 27, 1995 for the armed robbery and attempted murder of Mrs. Hazel Latham in Lafourche Parish, State of Louisiana. A Sanity Commission was held on October 23, 1995, and two days later, October 25, 1995, an arraignment was held. At the arraignment, Mr. Harman pled guilty to armed robbery and was sentenced to thirty (30) years in prison.

On July 12, 2000, after filing a timely application for

rehearing and Post-Conviction Relief, the matter came for hearing before the Honorable John E. LeBlanc. On October 23, 2000, Judgment was entered denying Mr. Harman's Application for Post-Conviction Relief.

Mr. Harman then filed an appeal in the First Circuit Court of Appeal for the State of Louisiana, which was denied on August 9, 2001. A subsequent appeal to the Louisiana Supreme Court was filed, and it was denied September 20, 2002.

Billy Harman, Jr. was arrested in Lafourche Parish, Louisiana, on July 27, 1995 for armed robbery and attempted murder of his grandmother, Mrs. Hazel Latham. Mr. Harman allegedly visited his grandmother's house for the purpose of obtaining some money, where he struck her on the head and stole her purse. At some point in the alleged attack, Mr. Harman was shot with a .25 caliber gun twice, once in the hand and once in the leg. Mr. Harman attested that at the time he was under the influence of both alcohol and "crack" cocaine.

Shortly after his arrest, Mr. Harman's court-appointed attorney, Mr. Bourgeois, filed a Motion for Appointment of a Sanity Commission on behalf of Mr. Harman. It had been discovered that Mr. Harman had an extensive history of psychological problems, and that he had been under treatment for many years. After the Motion was filed, the arraignment was postponed until determination could be made of Mr. Harman's competency to proceed. Mr. Bourgeois apparently had no subsequent contact with the case.

The panel appointed to examine Mr. Harman consisted of Dr. Coleridge T. Franklin, Jr., a psychiatrist, and Dr. Michael W. Cooper, a family practitioner.

Dr. Franklin filed a report with the court dated July 28, 1995 in which he made cursory reference to Mr. Harman's extensive psychiatric history and his ongoing treatment at Lofourche Parish Mental Health Center. Dr. Franklin concluded that Mr. Harman was both competent to stand trial and sane at the time of the offense.

Dr. Cooper filed two reports with the court. In the first, dated July 14, 1995, Dr. Cooper determined that Mr. Harman was not competent to stand trial and was likely unable to distinguish between right and wrong at the time of the offense. However, after reviewing a transcription of an audiotaped statement supposedly given by Mr. Harman on the morning of the arrest, Dr. Cooper reversed his field and reported that Mr. Harman was both competent to stand trial and sane at the time of the offense.

The legal admissibility of the transcribed statement had not been determined at that time - and still has not been determined - by the trial court. The statement was conveniently provided to Dr. Cooper by the office of the District Attorney in response to their apparent dissatisfaction with Dr. Cooper's original diagnosis.

On October 23, 1995, after several continuances, the Sanity Hearing (actually a Competency Hearing) was held. Mr. Harman was represented then, and had been represented for some time, by Ms. Diana Sanders, a longtime member of the indigent defender's office in Lafourche Parish.

Apparently without any knowledge whatsoever of Mr. Harman's extensive psychiatric history (evidence of which was apparent in her own case file as well as in the report of Dr. Franklin) or his current treatment at Lafourche Parish Mental

Health Center (also noted in Dr. Franklin's report), Ms. Sanders submitted the issue of competency to the Court for its determination based solely on the report of Dr. Franklin and the subsequent report of Dr. Cooper. No testimony was taken as to Mr. Harman's history, treatment or current medications, and no argument was made on the issue of competency. The Court found Mr. Harman competent to proceed.

Only two days later, on October 25, 1995, Mr. Harman entered a plea of guilty to armed robbery and was sentenced to serve 30 years at hard labor without benefit of parole.

Billy Harman filed pro se an Application for Post-Conviction Relief alleging inter alia that he was entitled to a new trial based on ineffective assistance of counsel. The hearing was ordered, undersigned counsel were eventually retained, recusation of the presiding judge was sought and granted, and the matter finally came before Hon. John E. LeBlanc, 17th Judicial District Court, for hearing on July 12, 2000.

B. Statement of Facts Adduced at Post-Conviction Hearing

The testimony of Dr. Cruse establishes, unbeknownst to anyone at court, an increase in the Mr. Harman's Haldol dosage on September 19, 1995, emergency hospitalization on October 21, 1995, with re-injection of Haldol dosage on October 21, 1995, six days before a plea was entered. At the time that Mr. Harman saw Dr. Cruse, on September 19, 1995, she was not Board Certified (p. 76, line 17) and this was one of the earliest patients she had ever treated (p. 79, line 16) as she had been there for about a month (p. 79, line 17).

When she first saw Mr. Harman he was on a 25 mg. 1/4 cc. IM dosage of Haldol D (p. 82, line 4) and was manifesting psychotic symptoms (p. 82, line 11).

Dr. Cruse increased the dosage of Haldol D threefold to 75 mg. 3/4 cc. IM on September 19, 1995 (p. 82, line 18), during the only time she saw Harman, a 45-minute visit (p. 104, line 112).

None of this information was provided to the Court at either the sanity hearing or competency hearing as Dr. Cruse was never asked to testify (p. 92, line 27).

On October 19, 1995, four days before the lunacy hearing and six days before the plea in this case, Harman presents to Dr. Cruse's office physically shaking and with feelings and delusions of God (p. 89, line 12); belief he could break through handcuffs (p. 89, line 15) and perception of little men and hearing of the devil's voice (p. 89, line 27).

In a glimpse of the cruel reality of forensic psychiatric treatment, unfortunately only a nurse saw him that day as neither Dr. Cruse nor any other physician evaluated Harman at that time (p. 98, line 4; p. 88, line 12).

Consequently a trained psychiatrist did not evaluate these conditions and symptoms and Mr. Harman was re-injected with another high dosage of at least 75 mg. of Haldol D 3/4 cc IM by the nurse (p. 88, line 7).

Having received no treatment or assessment from Dr. Cruse or any physician on October 19, 1995 other than a re-injection of Haldol D 75 mg. by a nurse, Harman's condition deteriorates to the point he is shaking so much and having other

psychotic episodic symptoms that he is transported to Chabert Hospital Emergency Room on October 21, 1995.

Amazingly the same conditions, namely the dystonic reactions to the medication (shaking) and delusions present on October 19, 1995 when no physician would see him are still present (See Chabert Emergency Room admit A-6).

As a matter of fact, a review of the emergency room admit form from Chabert Hospital sets forth that his dystonic reactions were so severe to the Haldol D that he was biting his tongue extremely hard.

Further, it is interesting to note that the 75 mg. Haldol D injection, which is considered high by Dr. Komiskey, may not be the actual dosage injected on October 19, 1995 and may explain the need for the emergency hospitalization a day and a half later on October 21, 1995.

Dr. Cruse testified that she did not even see much less inject Harman on October 19, 1995 and believed the dosage was the threefold increase to 75 mg. 3/4 cc IM of Haldol D.

However, after the injection his condition worsens and his dystonic shaking, similar to Parkinson Disease, becomes much worse in a short period of time requiring hospitalization on October 21, 1995.

A review of the Chabert Emergency Room report of October 21, 1995 indicates that the physician at the hospital wishes to decrease his Haldol D dosage to 100 mg. 3/4 cc IM.

Although Dr. Cruse states that the 100 mg. dosage is just misinformation given to the hospital (p. 86, line 19) it is

interesting to note Dr. Cruse states she doesn't know where that information came from and most importantly it was the nurse and not her who gave the October 19, 1995 injection of Haldol D.

Certainly, if the nurse gave Harman an injection of Haldol D on October 19, 1995 in excess of 100 mg., as is reflected on the emergency room report from Chabert, then that would readily explain the need to emergently transport him to the hospital on October 21, 1995 with a severe worsening of his condition and objective dystonic reactions to the Haldol D medicine.

Of course all of this is taking place after the Sanity Commission physicians examined him in July of 1995 and without any knowledge by his attorney who could and should present all these happenings to the Court at either the October 23, 1995 sanity hearing and/or the October 25, 1995 plea.

Dr. Cruse further testified that she is not a toxicologist (p. 91, line 7) that she did not subscribe to the teaching journal of psychotropic medication, namely "Science" magazine (p. 92, line 21) and at no time did she ever perform a Bennett criteria assessment on Mr. Harman (p. 93, line 1).

Additionally, the testimony of Dr. Harold Komiskey, Diplomate Toxicologist, established the effect of Haldol D at 75 Mg/Im Dosage on brain. Dr. Harold Komiskey obtained a Ph.D. from the University of Wisconsin in pharmacology and neuroscience (p. 108, line 31); a Post Doctorate at Ohio State University (p. 109, line 6); and has been a professor of clinical toxicology and toxicological effects of drugs on the brain at the University of Illinois and Washington State University (p. 109-110). Dr. Komiskey is presently a Professor of Toxicology at

Xavier University. He is a Diplomate of the American Board of Toxicologists (p. 110, line 118) and has published over twenty articles in learned journals (p. 110, line 112).

Dr. Komiskey testified that he has had occasion to study and teach the effects of Haldol D for over fifteen years (p. 111, line 117).

In essence Haldol D blocks one of the five dopamine receptors in the brain, namely D2.

Haldol is designed to block the dopamine receptor D2 and attempt to treat the positive symptoms of psychosis such as hallucinations and delusions.

The effect of Haldol D in the central nervous system has been well established in learned journals as causing dystonic reactions or shaking, but it also has an affect on the D receptor which affects the cognitive ability of the brain to comprehend.

In reviewing Mr. Harman's records Dr. Komiskey felt that the 25 mg. dosage was low but that the threefold increase to 75 mg. is high (p. 117, line 8).

As Dr. Komiskey testified, when he heard at the hearing, that in addition to Dr. Cruse diagnosing Harman with psychosis and schizophrenic behavior, that she also found him to be manic depressive, a light bulb went off in his head, because the introduction of Haldol at high dosages to a schizophrenic who also is manic depressive will increase the blockage of the dopamine receptors and in that type of person will affect memory (p. 117, line 25).

Dr. Komiskey also felt that the symptoms manifested on

October 19, 1995 of tremors, hallucinations, delusions and dystonic shaking were likely the result of the dosage of Haldol given Harman (p. 118, line 8).

> (NOTE: If Haldol injection on October 19, 1995 was in fact in excess of 100 mg., as reflected in October 21, 1995 emergency room report of Chabert Hospital, then effect of more medicine is logically consistent)

In discussing the effect of Haldol with the Court, Dr. Komiskey advised the Court of the March 17, 2000 article in Science magazine, which established that Haldol D has an effect on the cognitive ability of the brain and can decrease the working memory of the brain (p. 120, line 5).

In essence, it was previously established that Haldol blocks the central nervous system D2 receptor but this new study additionally shows that when Haldol D blocks the D receptor that
both short term memory and understanding are impaired (p. 119, line 121).

Dr. Komiskey opined that since Harman had been injected with Haldol D 25 mg. in August 22, 1995, 75 mg. on September 19, 1995 and at least 75 mg. on October 19, 1995 that for the purposes of his opinion Harman was using Haldol D on a chronic basis (p. 119, line 12).

It is further important to note the peak of efficacy of Haldol D, or the time when it is at its greatest strength, is six days after injection (p. 123, line 28).

It was for these reasons that Dr. Komiskey testified that the dosages and combinations of medicines given to Harman on

October 19, 1995 (two days before hospitalization, four days before Sanity Hearing and six days before plea) would more probably than not block his dopamine receptors, decrease his memory and awareness, and impair his ability to comprehend and understand situations that are presented to him (p. 120, line 16; p. 123, line 15).

In essence, as Dr. Komiskey testified, Mr. Harman was placed in a chemical straight jacket (p. 120, line 15).

Dr. Komiskey reviewed the Boykin transcript from October 25,1995 and pointed out to the Court the difficulty that Harman was having understanding concepts such as sentencing (p. 129, line 21) and of his desire to just retreat and withdraw from the stressful confrontation (p. 134, line 20).

When Harman is questioned during the Boykin proceeding he responds with terms as "I reckon" (p. 132, line 20), or "I just want to get it over with" (p. 133, line 15), which Dr. Komiskey testifies he would expect in a person who was re-injected with at least a 75 mg. Haldol D IM dose on October 19, 1995 (Note, emergency room record indicates dose in excess of 100 mg.) and where the peak efficacy of that drug would be taking place six days later on October 25, 1995 , the day of the plea (p. 123, line 18).

It is for this reason that Dr. Komiskey testified that from a toxicological standpoint that the absolute worst day that the plea could have been taken was on October 25, 1995, due to the known 75 mg. (or more) re-injection of October 19, 1995 (p. 135, line 27).

Dr. Komiskey explained to the Court that the reason he stated October 25, 1995 was the worst date to bring Harman in

for a plea was not only due to the six day efficacy argument due to the October 19, 1995 re-injection, but also for the fact that Harman had been in the high 75 mg. dosage for a two-month period and that his working memory would be impaired more.

Of course, the one fact present throughout discussion, is that not even his own attorney, or the Court was aware of his continued treatments and hospitalizations and the Court never at any time questioned Harman as to whether he was presently on any medication.

Counsel would suggest to this Court that most attorneys would not take a deposition of a person without questioning on that topic, much less take a plea for a 30 year sentence at arraignment, especially in light of the fact that one of the Sanity Commission physicians had changed his own mind regarding competency without any cross-examination by the attorney or questions by the Court.

On October 23, 2000 Judge LeBlanc entered a Judgment denying petitioner's Application for Post-Conviction Relief.

ARGUMENT

I. Mr. Harman received ineffective counsel which resulted in a guilty plea that would not have been made but for the inadequacy of representation.

State vs. Washington, 491 So.2d 1337 (La. 1986), is the leading Louisiana case on the issue of evaluating claims of ineffective assistance of counsel in the context of a guilty plea. First, the petitioner must show that, but for counsel's unprofessional errors, the result of the proceeding would probably have been different. Second, the petitioner must show

that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have instead gone to trial.

The Trial Court did not explicitly find that Billy Harman received ineffective assistance of counsel. While the evidence adduced at the hearing would abundantly support such a conclusion, the Trial Court apparently pretermitted a decision on this issue and instead based its ruling on the second prong of the two-prong test: that despite any errors of counsel, Billy Harman would nonetheless have pleaded guilty to the charge (Tr. of October 23, 2000, p. 9).

Therefore, it falls to undersigned counsel to establish initially for this Court that Mr. Harman's appointed counsel rendered ineffective assistance.

The performance of Mr. Harman's trial counsel was critically deficient in three areas:

1) Counsel was unaware at the time of the competency hearing that Mr. Harman was taking an anti-psychotic medication;

2) Counsel was unaware that one member of the sanity commission had originally deemed Mr. Harman incompetent to stand trial;

3) Counsel failed to do even a cursory investigation into Mr. Harman's psychiatric history.

On October 23, 1995 Billy Harman appeared in court for determination of his competency to proceed to trial and/or a determination of his sanity at the time of the alleged defense.

Billy Harman was at that time heavily medicated on an anti-psychotic drug known as Haldol.

Ms. Sanders' utter lack of preparation for this critical stage in the proceedings was evidenced by her testimony at the hearing on the Application for Post-Conviction Relief:

> Q. Would it be fair to say that on October 23 of 1995, you knew that Mr. Harman was on medication?
>
> A. I did not. I personally did not know he was on medication. (Tr. p. 20, lines 15-18).

At a hearing concerning the defendant's mental condition, the baseline inquiry involves whether that defendant is presently on medication. The fact that a client is being prescribed a medication such as Haldol indicates that there is a serious mental condition which is being addressed. Counsel's lack of knowledge of this crucial fact prohibited her from effectively representing Billy Harman at this hearing.

The second area in which counsel's performance was crucially deficient lies in her ignorance of the initial report prepared by Dr. Michael W. Cooper, the report wherein he finds that Billy Harman is both incompetent to stand trial and insane at the time of the offense.

This report of Dr. Cooper is critical to Mr. Harman's defense because it provides Mr. Harman with the only plausible defense to the charges of armed robbery and attempted murder under the facts of this case: that is, a defense of not guilty by reason of insanity. Instead of cross-examining Dr. Cooper on his reasons for changing his evaluation without even re-interviewing Mr. Harman, defense counsel submitted the matter

for an uncontested ruling of competency by the Court. Indeed there is no indication anywhere in Dr. Cooper's various reports that he is aware of Mr. Harman's extensive psychiatric history.

Counsel's failure to bring these issues to the attention of the Trial Court is inexcusable. As counsel herself stated at the hearing of this matter, referring to Dr. Cooper's report of July 14, 1995:

> "I haven't seen this report. This is the first time I have seen this report." (Tr. p. 27, lines 10 & 11)

Mr. Harman could not possibly receive adequate representation when the only possible defense available to him under the facts of his particular case was unknowingly abandoned by his counsel's failure to know what she ought to have known by a perfunctory examination of her own case file and the psychiatric reports in the court record. During her testimony at the hearing, after having been apprised of the contents of Dr. Cooper's initial report, trial counsel herself conceded the significance of this information in Mr. Harman's defense:

> Q. And the fact that Dr. Cooper changed his mind based strictly on reading the police report without doing any further evaluation of his patient would also be something that would be significant for the judge to know; wouldn't you agree?
>
> A. Yes, I would. (Tr. p. 27, lines 25-30)

The third area in which counsel's performance was deficient at the competency hearing is perhaps the most glaring example of ineffective assistance of counsel.

Mr. Harman's family had mailed to the public defender's office a list of medical facilities at which Billy Harman had been treated for mental illness beginning at eight years of age. According to counsel's testimony, this document was received in her office on July 7, 1995 (Tr. p. 20, lines 19-31).

The significance of Mr. Harman's psychiatric history in formulating a defense to the charges is exceedingly obvious in view of the State of Louisiana's evidence against Mr. Harman: an audio- taped confession along with the defendant's grandmother as the victim of the crime. Although the admissibility of that confession has never been determined by the Trial Court, it can safely be assumed that Mr. Harman had little or no defense based on the facts of the case. His only possible defense lay in his history of mental illness which could either have delayed the proceedings considerably while competency was regained; or provided the qualified defense at trial of not guilty by reason of insanity. For defense counsel never to have investigated Mr. Harman's only possible defense - after being provided, by her own admission, with the documentation to develop that defense - would unequivocally constitute ineffective assistance of counsel.

A. The dual questions of incompetent counsel and Mr. Harman's competency to plea are interrelated.

No one can suggest that Ms. Sanders made any effort to adequately represent Mr.

Harman. Facing a serious case with questions of both competency and sanity she:

1) Failed to obtain any of the numerous hospitalization records from age eight and give them to the physicians on the Sanity panel.

2) Failed to obtain the first report of Dr. Cooper stating Harman is incompetent.

3) Failed to even visit or interview Harman

4) Failed to obtain records or ascertain his current condition from Dr. Cruse including his September 19, 1995 and October 19, 1995 visits along with the October 21, 1995 emergency hospitalization records and give those to the physicians or Court

5) Failed to ask for a subsequent Sanity Hearing based on these records and treatment at Lafourche Mental Hospital or at the very least have a contradictory hearing on October 23, 1995 and physicians as to the impact of the current treatment on this diagnosis

6) Failed to hold a contradictory hearing

8) Permitted a man who was under the influence of large dosages of psychotic medication to enter a plea at arraignment to 30 years without having any Motions or raising a defense of insanity

Clearly, had any one or combination of these factors been performed, it is more probable than not that the outcome, namely declaring this man competent on October 23, 1995, would have been different; and having been found incompetent there would have been no plea of guilty accepted on October 25, 1995.

The question of Harman's competency directly relates to Ms. Sanders' ineffective assistance in that her failure to perform ethical duties in obtaining current information of Harman's mental condition effectively left him with no attorney at either the October 23, 1995 Sanity Hearing or the October 25, 1995 plea in violation of the Due Process Clause and the United States and Louisiana Constitution.

In essence due to Ms. Sanders' failure to properly represent Mr. Harman the Court did not find out prior to accepting either the competency stipulation or plea that:

1) Since July 1995, when the Sanity Commission physicians saw Harman, that he was being treated by Lafourche Mental Health Center;

2) That his dosage of Haldol D was increased from 25 mg. to three times that dose, to 75 mg. on September 19, 1995;

3) That on October 19, 1995, Harman presented to Lafourche Mental Health Center for treatment of tremors, dystonic reactions, delusions, and severe hallucinations;

4) That on October 19, 1995 no physician saw him and only a nurse gave him a re-injection of Haldol D of <u>at least 75 mg.</u> (Note: Chabert Emergency Room record establishes a 100 mg. dose);

5) That due to non-treatment on October 19, 1995 and/or increase in Haldol D dosage, Harman's symptoms and reactions worsened requiring hospitalization at Chabert Hospital on October 21,

1995;

6) That the peak effect of Haldol D is six days from the date of injection, which would be the date of the plea.

II. Due to the ineffectiveness of counsel provided to Mr. Harman, his guilty plea should be deemed effectively involuntary, and therefore to allow the plea to stand is a violation of Mr. Harman's Fourteenth Amendment right to Due Process.

As has been set forth herein above, the ineffective and substandard representation of defendant's counsel directly resulted in the plea taken on October 25, 1995.

The plea, having been taken at arraignment, and only two days after a sanity hearing where no witnesses were called and defense counsel was unaware of a prior report concluding the defendant was incompetent, can only be withdrawn if it was constitutionally deficient. State v. Deville 457 So.2d 864 (3d Cir. 1984)

When defendants plead guilty to the charges against them, the voluntariness of the plea is an important factor to consider in determining the reasonableness of acts and omissions of trial counsel. Boykin v. Alabama, 395 U.S. 238, 242-43 (1969). Furthermore, such plea is only effective and constitutionally valid to the extent that it is "voluntary and intelligent." Bousley v. United States, 523 U.S. 614, 618 (1998). The Fourteenth Amendment Due Process Clause imposes these requirements. Fischer v. Wainwright, 584 F.2d 691, 692 (5th Cir. 1978). As was stated by the court in Brady v. United States, the voluntariness of a plea is determined by "considering all of the relevant circumstances surrounding it."

397 U.S. 742, 749 (1970).

Once a plea has been made, the defendant may not thereafter raise independent claims as to constitutional violations which occurred before the plea was made. However, as was stated in McMann v. Richardson, a plea may be attacked if the defendant was incompetently advised by his attorney. 90 S.Ct. 1441, 1449 (1970). The Court went on to state that in order for a defendant to get relief in this context, he or she must "demonstrate gross error on the part of counsel when he recommended that the defendant plead guilty . . ." Id.

Clearly, even under this stringent standard, this plea was constitutionally deficient. Mr. Harman's attorney at the time the plea was entered, did not perform a baseline inquiry into the medical history of the defendant. She did not know that Mr. Harman was on psychotropic medication at the time of the arraignment. She did not subject either of the doctors appointed to the Sanity Commission to cross-examination. In failing to perform these basic lawyerly functions, attorney Diana Sanders could not competently advise Mr. Harman, and therefore his guilty plea is effectively involuntary. The plea was made by Mr. Harman with the belief that his attorney had explored the possible defenses and decided that a guilty plea was best. But in fact, his attorney had apparently explored none of Mr. Harman's defenses.

Furthermore, according to the expert opinion of Dr. Komiskey, testified that the dosages of Haldol given on October 19, 1995 would more likely than not impair Harman's ability to comprehend and understand as he was in a chemical straight jacket and it was the worst day to take such a plea from a toxicological standpoint. Since Ms. Sanders did not have any knowledge of her client's mental condition or the medication

that he was actively taking at the time of the plea, her professional judgment fell far below the standard of a reasonably prudent attorney. Had she known about the possible defects in Mr. Harman's judgment, she could have taken action to postpone the arraignment, or to have a Sanity Commission conduct testing on that day to ensure that her client was able to fully understand the proceedings, and the consequences of his actions. Without performing these fundamental tasks, which even a superficial investigation would have made available, the advice offered to Mr. Harman constitutes gross error. Therefore, to allow the plea to stand would be unconstitutional.

III. Allowing Mr. Harman's guilty plea to stand would be a violation of the Sixth Amendment to the Constitution in that such action would deprive him of his right to be represented by competent counsel.

Mr. Harman's plea of guilty, which resulted in a 30 year sentence without the benefit of parole, was given as a result of ineffective counsel. According to the Sixth Amendment to the Constitution, an accused's right to be represented by counsel is fundamental. U.S.C.A. Const. Amend. 6. "It has long been recognized that the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, at 771. The core purpose of the Sixth Amendment's right to counsel is to ensure "Assistance at trial, when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." United States v. Ash, 413 U.S. 300, 309 (1973). Thus, "if no actual 'Assistance' for the accused's 'defence' is provided, then the constitutional guarantee has been violated." United States v. Cronic, 466 U.S. 648, 654 (1984).

The leading cases on ineffective assistance of counsel

are Strickland v. Washington, 466 U.S. 668 (1984) and United States v. Cronic., which were decided on the same day. The trial court relied on Strickland to formulate their opinion, but defendant insists that the correct analysis should follow the spirit of Cronic. However, even if the Strickland test is applied, defendant asserts that the result should be the same, and a new trial should be ordered.

In Strickland, the Court formulated a "two-part test to evaluate claims that a defendant's counsel performed so incompetently in his or her representation of a defendant that the defendant's sentence should be reversed." Bell v. Cone, 122 S.Ct. 1843, 1850 (2002). First, the Court reasoned, the defendant must show that counsel's performance was deficient. Strickland v. Washington, at 687. This requires showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. Second, the defendant must show that the "deficient performance prejudiced the defense." Id. This second prong requires "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. According to the Court in Strickland, "[u]nless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." Id.

The first part of the Strickland test was not specifically ruled upon by the trial court. In other words, the trial court never explicitly found that Billy Harman received ineffective assistance of counsel. Instead, the court focused on the second prong of the test: that despite any possible errors of counsel, Mr. Harman would have nonetheless pleaded guilty to the charge. Tr. of October 23, 2000, p.9. However, defendant contends that had counsel taken steps that a "reasonably

competent attorney" would have taken, and given Mr. Harman advice that was "within the range of competence demanded of attorneys in criminal cases," he would not have felt compelled to plead guilty, and would have been prone to take the matter to trial. Strickland v. Washington, at 687.

Regardless, since the trial court refused to fully address the first prong of the Strickland analysis, defendant insists that the evidence adduced at the Post-Conviction Relief hearing was more than ample to satisfy the test, which is to say the ineffectiveness of counsel is beyond doubt. There are three specific areas in which counsel's ineffective assistance to Mr. Harman is demonstrated. The first of these is that counsel was not aware, on the date of Mr. Harman's plea and sentencing, that he was currently undergoing treatment for mental illness and was in fact on medication. This lack of knowledge is inexcusable when one considers that this information could have been discovered easily in the briefest of interviews with Mr. Harman, or by a cursory review of the reports prepared by the physicians assigned to examine Mr. Harman to determine his competency and sanity. Specifically, the report of Dr. Franklin states in the first paragraph that Mr. Harman is "presently being treated at Lafourche Parish Mental Health and is receiving Haldol, Lithium and Cogentin." When one considers that the issue of Mr. Harman's competency was decided upon the mere submission of these reports, it is inexcusable for counsel not have been aware of their contents.

Secondly, counsel demonstrated a complete lack of knowledge that Dr. Cooper had prepared two contradicting reports concerning Mr. Harman's competency to stand trial. The first such report stated unequivocally that Mr. Harman was not competent to stand trial; the second reversed this diagnosis. Counsel's lack of knowledge of the original report precluded

the possibility of Dr. Cooper being cross-examined as to the basis for his diametrically opposing opinions. Not only does the Louisiana Code of Criminal Procedure require the Clerk of Court to provide counsel for both sides a copy of Sanity Commission reports, but undersigned counsel easily found the reports in the court record. Whatever the reason may be for counsel'd lack of knowledge, the incontrovertible fact exists that counsel ought ot have been aware of the existence of these reports, and she ought to have cross-examined both Dr. Cooper and Dr. Franklin as to their findings.

Finally, counsel was obviously deficient in her failure to further investigate the information that was given to her by defendant's family concerning his prior hospitalizations for treatment for mental illness. Counsel's failure to develop this information by obtaining records of Mr. Harman's various hospitalizations or, at the very least, providing the information to the members of the Sanity Commission is inexcusable and indefensible. It is apparent that a verifiable history of mental illness is a crucial factor when determining whether a defendant is competent to stand trial. Even though Dr. Franklin made reference to Mr. Harman's illness, there was no indication that Dr. Cooper was ever aware of Mr. Harman's history.

It is clear that appointed counsel's representation of defendant was seriously deficient in these three specific areas. It is equally evident that these deficiencies were so serious that counsel was not acting as the "counsel" guaranteed by the Sixth Amendment. But, again, the trial court never addressed this issue, basing its opinion instead on the belief that Mr. Harman would have pleaded guilty even if counsel had been found ineffective.

However, there are circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. United States v. Cronic, at 658. This is the crux of the reasoning in Cronic, and it is this analysis that the court should have applied. In Cronic, the Court fashioned an alternative test which effectively does away with the second prong of the Strickland analysis. In certain situations, constitutional error can be found regardless of any showing of prejudice to the accused.

The most obvious situation, the court states, is the complete denial of counsel. Id. at 659. The presumption, reasoned the Court, that counsel's assistance is essential "requires [the court] to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." Id. A fair interpretation of the present case would yield a result similar to this situation, as the failure of counsel to make even a cursory investigation of Mr. Harman's possible defenses is tantamount to a complete denial of counsel. As the Sixth Amendment implies, "[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. U.S.C.A. Const. Amend. 6. Clearly, counsel failed to comply with this general principle, and thus effectively left Mr. Harman without assistance at arguably the most crucial stage in the proceeding.

However, it is the second situation the Court puts forth which most aptly fits the facts of the present case. The Court stated that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." Id. In the present case, counsel for the accused failed to investigate or develop the incompetency of Mr. Harman to stand trial or to enter a

plea, which were his primary, if not only, defenses. Such a failure to put the prosecution's case to an adversarial test certainly falls into this exception to the strictures of Strickland.

Furthermore, in Davis v. Alaska, the Court held that no specific showing of prejudice was required because the petitioner had been "denied the right of effective cross-examination" which "would be constitutional error of the highest magnitude and no amount of showing of want of prejudice would cure it." United States v. Cronic, at 659 (citing Davis v. Alaska, 415 U.S. 308, 318 (1974)). Clearly, the fact that counsel for Billy Harman failed to cross-examine the physicians who examined Mr. Harman places her action in conformity with this exception. The adversarial process envisioned and protected by the Sixth Amendment requires that the defendant have "counsel acting in the role of an advocate." Anders v. California, 386 U.S. 738, 743 (1967). "The right to effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronic, at 656. Counsel for the defendant failed to discharge this responsibility, and therefore, the Sixth Amendment right of Billy Harman has been violated.

CONCLUSION

It is a fundamental right of an accused person that his counsel, whether appointed or retained, do at least minimal investigation to ascertain the basic facts and possible defenses in order to exercise a knowledgeable judgment of how best to proceed in a criminal matter. Failing to perform even these minimal tasks is sanctionable even in a civil matter. To do less in a criminal prosecution, involving an unfortunate person stricken with a serious mental disease, and under the influence

a psychotropic medication to treat this illness, is tantamount to abandonment, to leaving the baby out in the cold to suffer the elements.

In this proceeding, in which Billy Harman entered a guilty plea resulting in a sentence of 30 years incarceration, Mr. Harman's counsel was in effect blind to the psychiatric evidence, in that she made no inquiry or investigation and thus deprived Mr. Harman of his constitutional right to due process of law, and his right to effective counsel.

The unfortunate irony is that the crucial evidence would have been easily discoverable to an attorney who made the slightest attempt to find it; unfortunately, Mr. Harman's counsel did not make that slight attempt.

Billy Harman deserved competent representation, and did not receive it. His rights deserved to be protected, and they were not.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A

THE SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA

VS. NO. 2001-KP-2532

BILLY D. HARMAN, JR.

IN RE: Harman, Billy D. Jr.; - Defendant; Applying for Supervisory and/or Remedial Writs, Parish of LaFourche, 17th Judicial District Court Div. A, Nos. 281347; to the Court of Appeal, First Circuit, No. 2001 KW 0281

September 20, 2002

Denied

PFC
CDK
BJJ
JPV
CDT
JTK
JLW

Supreme Court of Louisiana
September 20, 2002

s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

APPENDIX B

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA

VERSUS NO. 2001 KW 0281

BILLY D. HARMAN, JR.

AUG. 9, 2001

In re: Billy D. Harman, Jr., applying for supervisory writs, 17th Judicial District Court, Parish of Lafourche, Docket Number 281,347.

WRIT DENIED.

JEK
JLW
BMF

COURT OF APPEAL, FIRST CIRCUIT

/s Elizabeth D. Haute
DEPUTY CLERK OF COURT
FOR THE COURT

APPENDIX C

17TH JUDICIAL DISTRICT COURT
PARISH OF LAFOURCHE
CASE NO. 281-347 DIVISION "A"

STATE OF LOUISIANA

VERSUS

BILLY D. HARMAN, JR.

NOTICE OF INTENTION TO SEEK WRITS OF CERTIORARI AND REVIEW

NOW COMES Billy D. Harman, Jr., through undersigned counsel, and respectfully gives notice to this Court of his intention to seek Writs of Certiorari and Review to the First Circuit Court of Appeal of this Honorable Court's ruling on October 23, 2000, denying his Application for Post Conviction Relief.

Respectfully submitted,

s/ Kendall P. Green
KENDALL P. GREEN
PATRICK H. HUFFT
3316 Canal Street
New Orleans, La. 70119
Telephone: (504) 822-5220

ORDER

CONSIDERING THE FOREGOING NOTICE;

IT IS HEREBY ORDERED that Billy D. Harman, Jr. be given 30 days in which to file Writs of Certiorari and Review with the First Circuit Court of Appeal.

Thibodeaux, Louisiana this 20th day of November, 2000.

/s John E. LeBlanc
HONORABLE JOHN LEBLANC
JUDGE, DIVISION "A"
17TH JUDICIAL DISTRICT COURT

APPENDIX D

CRIMINAL CASE MINUTES OF THE
SEVENTEENTH DISTRICT COURT
PARISH OF LAFOURCHE
THIBODAUX, LOUISIANA

C 281347	STATE OF LOUISIANA VERSUS BILLY D. HARMAN JR. ARMED ROBBERY
10/23/2000 A	THIS MATTER CAME UP THIS DAY FOR POST CONVICTION RELIEF. THE DEFENDANT WAS PRESENNT AND REPRESENTED BY MR. KENDALL P. GREEN AND MR. PATRICK HUFFT. THE COURT DENIED POST CONVICTION RELIEF APPLICATION. STATE IS TO PREPARE AND SUBMIT JUDGMENT WITHIN 14 DAYS.

s/ Melinda R. LeBlanc
DEPUTY CLERK, SEVENTEENTH JUDICIAL
DISTRICT COURT, LAFOURCHE PARISH, LA
JANUARY 31, 2001

APPENDIX E

17TH JUDICIAL DISTRICT COURT
PARISH OF LAFOURCHE
STATE OF LOUISIANA

STATE OF LOUISIANA

NUMBER: 281347

VERSUS

DIVISION A

BILLY HARMAN, JR.

Transcript of the post-conviction relief proceeding held on the 23rd day of October, 2000, in the above-entitled and numbered cause before presiding Judge, Honorable John E. LeBlanc, at Thibodaux, Louisiana.

APPERANCES: MR. STEPHEN CAILLOUET
Assistant District Attorney
Representing the State of Louisiana
MR. KENDALL P. GREEN
MR. PATRICK H. HUFFT
Representing the Defendant
BILLY HARMAN, JR.,
Defendant

****

THE COURT:

Docket number 281347,

post-conviction relief application of Billy Harman, Jr. Let's have appearances for the record, please.

MR. GREEN:

Kendall Green, your Honor, for Mr. Harman.

MR. HUFFT:

Patrick Hufft for Mr. Harman.

MR. CAILLOUET:

Stephen Caillouet representing the district attorney's office.

THE COURT:

We are here today for rendition of judgment, the Court having previously taken testimony several months ago. I believe we were originally set for rendition of judgment in September, but due to paperwork problems, Mr. Harman was not present. So the matter was re-fixed for today. He is presently in court. I have received defense counsels' memorandum in support of its application for post-conviction relief. I believe the State's position basically relied on its closing argument at the hearing as evidence. I did not receive any memorandum. Did y'all submit one?

MR. CAILLOUET:

One was not submitted, your Honor.

THE COURT:

Post-conviction relief, particularly in cases where there is a plea bargain, are difficult cases for the Court to determine. The allegations are that the counsel for the defendant was so ineffective that I believe the position of the defendant is that he did not

have sufficient representation within which to enter a plea of guilty. There is also an allegation that there was a mental defect at the time of the plea and he did not understand the rights that he was giving up at the time of the plea. There factors intertwined within those two larger issues that were set out by counsel.

The Court is bound by, of course, the Strickland case. When a convicted defendant complains of ineffective assistance of counsel, the defendant must show counsel's representation fell below an objective standard of reasonableness. When there is a plea, I believe that the defendant has a higher burden as well, though. The defendant must show that there is a reasonable probability that but for counsel's errors, if any, he would not have pleaded guilty and would have insisted on going to trial. And that is the language set out in State versus Louisiana, Supreme Court case in 1986 491 So.2d, page 491, So.2d 1337. Of course, because this is West Law, I don't have the exact page number for the cite. I believe in Strickland versus Washington error by counsel alone is not sufficient. So we must look at the degree and magnitude of counsel errors. We also, when there is a criminal case, a defendant is presumed sane and is responsible in that he is responsible for his actions, and he has the burden of proving otherwise.

There was a sanity commission empaneled who examined the defendant. The reports that were submitted to the Court for the Court's consideration at the time indicated that the defendant was competent to proceed and assist counsel. Those examinations took place some four months prior to the plea, and the issue came up at the hearing as to whether or not that is good practice because a person's sanity or mental

capacity is in a state of flux potentially when there are mental problems.

The defendant was under active treatment through the Lafourche Parish Mental Health Unit. He was on Haldol. There is some dispute over the quantity of Haldol because the amounts reflected from a visit to Chabert do not in any way comport with the amounts documented to be administered under the prescribed dosage at Raceland Mental Health.

On the date of the sanity commission hearing the reports were submitted. I believe the date of that hearing was – let me ask counsel if you have it at your fingertips. I know the Boykin was October 25th.

MR. GREEN:

October 23rd was the date of the hearing, your Honor.

THE COURT:

I wasn't sure if it was three or four days, but two days. Okay. Two days later the defendant, after the Court determined that he was competent to proceed, based on the reports, again, the Court went through what is called a Boykin and plea, which is nothing more than a conversation between the Court and the defendant. And the Court must determine from that one conversation in every Boykin examination whether or not it deems the defendant understands what his rights are and that he is waiving his legal rights set out in Boykin. The Court must determine that the accused has an understanding of what the plea is going to mean and what its consequences will be. The Court must determine that he understands the nature of the charges, that he has a right to a jury trial in felony cases, that he understand

what acts are sufficient to constitute that offense that he is charged with and the range of sentences that would apply to that specific crime.

An attorney who is appointed to represent or any attorney who represents a defendant has the duty to represent a client zealously and to insure his protection under the sixth amendment.

Ms. Sanders, in her testimony about what happened, was not very specific in her recollections of dealing with Mr. Harman. The Court's dealing with Mr. Harman is a little bit more clear because there is an actual transcript of the conversation they had. We don't have a transcript of conversations between Mr. Harman and Ms. Sanders. I do not think that the post-conviction relief application made by Mr. Harman was taken lightly by counsel. I think it is a very serious thing. And I have to tell you, this is a very close call which gives the Court great difficulty.

When the Court Boykined Mr. Harman, the Court reviewed the rights set out by Boykin and even discussed with Mr. Harman the fact that he had been treated for mental illness. It was a brief discussion. But there was a responsiveness from Mr. Harman. One of the allegations is that Mr. Harman was in a mental straight jacket. I am not convinced of that. I do believe he was on the medication that he was prescribed. Because certainly when the Court started talking about the sentence, and that it was going to be 30 years without benefit of parole, probation or suspension of sentence, Mr. Harman didn't have any problems with raising a question as to his understanding as to what that sentence would be. He understood full well after being told that it was a plea bargain, which the judge had agreed to, of 30 years without benefit of probation, parole or suspension of sentence. I think he thought, because he says I

thought that without benefit of parole or probation, and he was given the opportunity to discuss that fact with his lawyer.

There was further discussion apparently when there was a brief interlude where he talked to his lawyer. There must have been some discussion about the possible release dates because the lawyer states on the record that the problem is I can't tell him. I don't even think the Court knows about possible release dates. Certainly the mind is working when you are worried about when you are getting out after you pled guilty to something that you know you did.

I do understand that other jurisdictions have sanity commissions at the ready on Boykin days. I wasn't sure how it was done. I understand now. But I certainly do not find Ms. Sanders assisting ineffectively by the fact that a sanity commission hearing was done at a time not contemporaneously with the plea. I don't think this Court is aware of any case in Lafourche where that has been done contemporaneously. In a perfect world maybe we could have psychiatric hospitals with staff on stand by in every parish.

In the case of State v. Washington, even if I find some of her actions deficient to satisfy the prejudice requirement, Mr. Harman must show that but for her errors, he would not have pleaded guilty and would have insisted on going to trial. I think he has successfully proven that he may have been being treated with the drugs that were prescribed for him, but there was no testimony that he was being given the wrong drugs. The only evidence that he was given an amount higher than what was supposed to have been given was a statement from Chabert, who did not even administer the drugs. So I don't find that

he was inadequately medicated. The Court will deny the defendant's post-conviction relief application.

While I haven't addressed every specific incidence set out, the basis for my decision is a review of the record and the transcript of what happened at the time of the plea. I believe that Mr. Harman understood what he was pleading to. I believe he understood what rights he was giving up. And I believe that Judge Enry properly found that he was competent to waive his rights plead guilty. And I believe that he knew that he knew that he had already confessed to it. And I believe that he knew what happened so that he pled to it. The fact that he disagrees with the sentence now is a different matter. So I don't believe that he would have insisted on going to trial.

The State will prepare a judgment and get it to the Court within 14 days denying the application for post-conviction relief. Please send a copy to counsel so that they can request writ application. I am sure they are going to contest it. I note your objection.

MR. HUFFT:

Yes, your Honor. Note our objection to the Court's ruling.

THE COURT:

The objection is noted. Provide me with the paperwork that you need.

(END OF PROCEEDINGS)